

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VALERIE HIRATA, *et al.*,

Plaintiffs,

v.

SOUTHERN NEVADA HEALTH
DISTRICT, *et al.*,

Defendants.

Case No. 2:13-cv-02302-LDG (VCF)

ORDER

Steven Zimmerman, who is not a party to this litigation but has been deposed as a witness, moved to disqualify Whitney Selert from representing the plaintiffs. The Magistrate Judge granted the motion in part and denied it in part, ruling that Selert shall not have any direct involvement with Zimmerman during a deposition or at trial (ECF No. 98). Zimmerman has filed objections, arguing that the Court disqualify Selert from any further participation in this matter (ECF No. 106). The defendants have opposed, and further object to the Magistrate Judge's ruling precluding Selert from being directly involved with Zimmerman at trial (ECF No. 130). The Court will deny both objections.

In objecting, Zimmerman raises the same arguments he presented to the Magistrate Judge. Zimmerman's arguments rest on the premise that an implied attorney-client

1 relationship was established between Zimmerman (an employee of the Southern Nevada
2 Health District) and Selert (who informed Zimmerman during the meeting that he was
3 defending the Health District). The record, however, requires the conclusion that Selert
4 and Zimmerman did not enter into an attorney-client relationship, implied or otherwise.
5 Rather, Zimmerman's conduct immediately prior to his meeting with Selert (informing a
6 plaintiff that he would be meeting with the Health District's legal counsel, presumably in
7 connection with the plaintiff), his conduct during that meeting (making a tape recording
8 without Selert's knowledge, and stating to Selert that maybe he needed an attorney), and
9 his conduct immediately after the meeting (proffering his tape recording to a plaintiff),
10 require a finding that Zimmerman understood and realized that Selert was not representing
11 him but was, instead, representing the Health District. Further, Zimmerman's conduct
12 establishes that, promptly following the meeting, he did not consider his meeting with the
13 defendant's legal counsel to be confidential, but was instead offering to disclose the
14 entirety of the meeting to the plaintiffs. Selert never owed a duty of loyalty to Zimmerman.

15 Zimmerman's arguments that Selert should be disqualified from representing the
16 plaintiffs because of statements Selert made during the interview are equally without merit.
17 The Magistrate Judge did not clearly err in ruling that Selert should not be completely
18 disqualified from representing the plaintiffs. The Court will deny Zimmerman's objections.

19 The defendants argue that the Magistrate Judge erred in finding Selert violated
20 Nevada Rule of Professional Conduct 1.13(f), a finding they indicate they are challenging
21 only because Zimmerman's objection has required them to again address whether and to
22 what extent Selert can continue to represent the Health District. Rule 1.13(f) states in
23 relevant part:

24 In dealing with an organization's . . . employees, a lawyer shall explain the
25 identity of the client to the constituent and reasonably attempt to ensure that
26 the constituent realizes that the lawyer's client is the organization rather than
the constituent.

1 In his oral ruling, the Magistrate Judge stated:

2 [W]hen an attorney is representing an employer in litigation and meets with a
3 witness who is also a current employee of his client, it certainly is important
4 that the employee – that the attorney clearly clarify for that employee whether
or not he’s representing the employee. And it – I mean, on the record in front
of me, that was not done here. There’s really no question about that.

5 The defendants argue that Rule 1.13(f) mandates an attorney to: (1) explain to the
6 employee that his client is the employer and not the employee, and (2) “reasonably attempt
7 to ensure” the employee realizes the attorney represents the employer and not the
8 employee. They argue that Selert did explain to Zimmerman that his client was the Health
9 District. The defendants’ reliance on the introduction of Selert as counsel for the Health
10 District does not satisfy Selert’s obligation to explain to Zimmerman that Selert was
11 representing the Health District. The defendants do not point to any portion of the
12 transcript of Selert’s meeting with Zimmerman in which Selert explained the identity of his
13 client. Selert’s several references to the identity of his client, such as indicating his “job”
14 was to defend the Health District, do not clearly satisfy the requirement of *explaining* to
15 Zimmerman, as an employee of the Health District, the identify of Selert’s client. The rule
16 does not require an attorney to refer to the identity of his client while speaking with an
17 employee. Rather, the rule requires that the attorney explain to the employee that the
18 attorney represents the employer and not the employee.

19 Nevertheless, even assuming that Selert’s brief references that he was defending
20 the Health District were sufficient as an explanation that Selert was not representing
21 Zimmerman, Selert did not meet the requirement of reasonably attempting to ensure that
22 Zimmerman understood that Selert represented the Health District and not him. The
23 defendants suggest Selert satisfied the requirement because any reasonable attorney
24 could have concluded that Zimmerman realized that Selert was not representing him.
25 While the Court agrees that the transcript of the meeting would allow any reasonable
26 attorney to draw this conclusion, that is not the requirement of the Rule. Rather, the rule

1 requires the attorney to make a reasonable attempt to ensure the employee realizes the
2 attorney is not representing him. In the context of the Rule, a “reasonable attempt”
3 requires something more than simply observing an employee’s conduct during the course
4 of a meeting and, at some undefined point, drawing a conclusion that the employee
5 realizes that the attorney is not representing the employee. Rather, the reasonable attempt
6 must occur in the context of the explanation. Absent from the defendants’ argument or
7 evidence is any indication that Selert made any such “reasonable attempt” in the context of
8 his cursory references that he was defending the Health District.


9 In his declaration, Selert asserts: “It was clear to me Zimmerman knew I represented
10 only SNHD and did not represent [Zimmerman].” Selert then indicates he reached this
11 conclusion because Zimmerman did not question whether Selert represented him or
12 otherwise indicate such a belief. Selert’s assertions regarding his observations and
13 conclusions are not relevant. Rule 1.13(f) is not triggered by the absence of a statement or
14 question by an employee indicating the employee’s mistaken belief that the attorney
15 representing the employer also represents the employee. Rather, Rule 1.13(f) places the
16 burden on the attorney to make a “reasonable attempt” to ensure that the employee does
17 not have such a misunderstanding.

18 Selert further suggests his conclusion that Zimmerman understood that Selert did
19 not represent him is supported by Zimmerman’s statement, during the meeting, that maybe
20 he needed his own lawyer. The statement might be evidence whether the “reasonable
21 attempt” requirement was satisfied by asking the employee, “Do you understand?” as a
22 follow-up to the explanation of the identity of the client. The statement might also be
23 evidence that Zimmerman understood that Selert did not represent him. Zimmerman’s
24 statement is not, however, evidence that Selert engaged in the act of making a reasonable
25 attempt to ensure Zimmerman understood that Selert did not represent him. The evidence
26 submitted to the Magistrate Judge and to this Court establishes that Zimmerman did not

1 utter the statement in response to any effort or attempt by Selert to ensure Zimmerman
2 realized that Selert did not represent him.

3 As the defendants have not shown that the Magistrate Judge clearly erred in finding
4 that Selert did not comply with the requirements of Rule 1.13(f), the Court will deny their
5 objection.

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7 DATED this 31 day of March, 2017.

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10 Lloyd D. George
11 United States District Judge
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